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1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY  
3 CIVIL ACTION NO. 05-cv-2367 (SRC)(CCC)

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5 IN RE: MOTION TO INTERVENE  
6 MERCK & CO. INC. SECURITIES  
7 LITIGATION IN RE: MDL 1658  
8 Submaster to Civil 05-1151  
(Merck & Co., Inc., Securities,  
Derivative & "ERISA"  
Litigation)

9

10 January 25, 2007  
11 Newark, New Jersey

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13 B E F O R E: HONORABLE STANLEY R. CHESLER, USDJ  
14

15 Pursuant to Section 753 Title 28 United States Code, the  
16 following transcript is certified to be an accurate record as  
taken stenographically in the above-entitled proceedings.

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Official Court Reporter

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1 A P P E A R A N C E S:

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For Objector, Boston Retirement System

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1 THE CLERK: This is Merck Securities Litigation.

2 Please note your appearances for the record.

3 MR. CECCHI: James Cecchi, Carella, Byrne, appearing  
4 on behalf of the parties to the stipulation. Good afternoon,  
5 your Honor.

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6 MR. BROWER: David Brower, Brower & Pivin, your  
7 Honor, on behalf of lead plaintiffs.

8 MR. SANDSTEDT: Erik Sandstedt, Bernstein Litowitz,  
9 on behalf of Mississippi.

10 MR. BRODY: Jules Brody, Stull, Stull & Brody, on  
11 behalf of lead plaintiffs.

12 THE COURT: Okay.

13 MR. DUBBS: Thomas Dubbs and James Johnson, Labaton  
14 Sucharow & Rudoff, for Boston Retirement System, the  
15 objector.

16 THE COURT: Mr. Dubbs.

17 MR. DUBBS: Your Honor.

18 THE COURT: All right. Do we have somebody  
19 representing Merck here?

20 MR. BARON: Robert Baron, Cravath Swaine & Moore for  
21 the Merck defendants.

22 THE COURT: I just wanted to make sure that you  
23 weren't left behind.

24 THE COURT: Very good. As the parties know, this  
25 matter is before the Court on the application of various

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1 plaintiffs for the Court to approve a stipulation and  
2 proposed order resolving the motion of the Public Employees  
3 Retirement System of Mississippi to intervene and modifying  
4 the lead plaintiff and lead counsel structure in this matter.

5 The Court has received one objection to it from the  
6 law firm of Labaton Sucharow, and Mr. Dubbs is here and, Mr.  
7 Dubbs, we might as well go right to you, if you wish, I'll  
8 hear you.

9 MR. DUBBS: Very well, your Honor. Thank you. Good

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10 afternoon, your Honor. May it please the Court, my name is  
11 Thomas Dubbs, I'm from the Labaton firm and we represent the  
12 Boston Retirement System that has filed an objection pursuant  
13 to the Court's order that permitted us to do so. We have New  
14 Jersey counsel here if you want me admitted pro hac or I'll  
15 proceed as you see fit.

16 THE COURT: Any preferences by any of the parties?

17 MR. CECCHI: No, your Honor.

18 THE COURT: Who is going to be your local counsel?

19 MR. DUBBS: Well, Mr. Lite is here to admit me pro  
20 hac if necessary.

21 THE COURT: I'll tell you what, we'll admit you pro  
22 hac. That way the Client Security Fund can at least benefit  
23 from your presence. All right.

24 MR. DUBBS: Thank you, your Honor.

25 THE COURT: Mr. Lite, you're appointed local

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1 counsel. Mr. Dubbs, you're admitted pro hac vice. Please  
2 proceed.

3 MR. DUBBS: Thank you, your Honor. I will be brief.  
4 We are here in essence to advance the position that had been  
5 previously advanced by Mississippi that the best course in  
6 the context of this litigation given the issues with the  
7 leadership structure is to open it up for a new lead  
8 plaintiffs series of applications. We are aware that that  
9 would take some time. We do not think that time would be  
10 prejudicial and we think that that is the most prudent course  
11 in the long run. It will avoid objectors down the road, it  
12 will a void opt-outs down the road, as Mississippi's counsel  
13 put in their papers that were recently submitted.

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14 So, in effect, we adopt much of what Mississippi  
15 said in their papers. I think we would have toned down their  
16 language but the basic message we agree with and we are here  
17 to advance that position to open it up. The stipulation --

18 THE COURT: You're going to be moderate today, Mr.  
19 Dubbs?

20 MR. DUBBS: Yes, your Honor, I am. It's a new day.  
21 I've learned a lot. The stipulation on its face is  
22 problematic before we get to the Mississippi issue. We have  
23 proposed four new co-lead plaintiffs, including Mississippi.  
24 We have Mr. Haber, we have Mr. Levan, who has retained Mr.  
25 Brower, we have Mr. Reynolds, who seems to have retained the

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1 Dreier firm, which is not part of the co-lead structure but  
2 Mr. Reynolds in his declaration says that the Dreier firm is  
3 going to do a lot of work, so, just it's a footnote point but  
4 it indicates somewhat paradoxically the hodge-podge that this  
5 has become, which is that you have one co-lead plaintiff  
6 whose lawyer isn't even part of the co-lead counsel  
7 structure.

8 Now, as to the class counsel, we have the addition  
9 of Brower Pivin and we have the addition of the Bernstein  
10 Litowitz firm. We adopt Mississippi's arguments as to Mr.  
11 Brower's firm and that they do have to be approved by this  
12 Court under the Merck decision and that we believe that they  
13 should be subject, as should Bernstein Litowitz, to the  
14 provisions of the PSLRA.

15 But more importantly, more importantly than the  
16 lawyers, because they are fine lawyers, is what about the  
17 clients and, in particular, Mississippi, and should



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18 Mississippi be able to, by stipulation and order of this  
19 Court, be able to come in sideways and to become a co-lead  
20 plaintiff of this important matter and ultimately, depending  
21 upon how things shake up, they may be the single most  
22 important lead plaintiff. If that is the case, we believe  
23 that other institutional investors, and we know several who  
24 are watching this proceeding very carefully in addition to  
25 Boston, it should be opened up so that everyone has the

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1 opportunity and that that is the safest course to go.

2 Let's do it right. Let's look at the numbers.

3 Let's see what the real numbers are. Let's have a short  
4 hearing and briefing the way we usually do and at that point  
5 we think -- and we're prepared to let the chips fall where  
6 they may. Boston may end up with the short stick, but  
7 wherever they fall, at that point there will be certainty in  
8 the litigation. There will not be the risk of collateral  
9 attack and everyone will know that not only the letter of  
10 Merck but the spirit and instructive nature of Merck has been  
11 followed.

12 Both sides have submitted cases where this has been  
13 done before. There's a bit of a disagreement as to whether  
14 it's been done before where there has been multiple lead  
15 plaintiffs. I'm involved in the HealthSouth situation on  
16 behalf of New Mexico and Michigan where the court could have  
17 appointed -- given a client who had already been a co-lead,  
18 made that client the sole lead, had already been approved,  
19 but Judge Bowdre decided no, the safer course, the more  
20 prudent course was to open it up for a new series of lead  
21 plaintiff applications, which she did, and I think the result

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22 there has been salutary. Judge Scheindlin under slightly  
23 different circumstances ended opening it up. The easiest  
24 thing to do is to open it up.

25 The stip itself is, we would respectfully submit, a

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1 virtual admission that there is some tension, problem with  
2 the leadership structure as it was constituted before  
3 Mississippi was invited to the party, or else why would they  
4 have done it except for the obvious reasons.

5 Turning to Mississippi's position, although we  
6 probably would have put it differently, quoting from just one  
7 part of their brief, The increase in the number of the law  
8 firms potentially involved in this action from three to five  
9 without the Court-ordered substitution of any, as well as the  
10 apparent disagreement as to who will control this litigation,  
11 strongly suggests that the present lead plaintiffs are not  
12 fulfilling their duty to supervise and control their counsel  
13 and that this litigation is completely lawyer driven. That's  
14 on page 13 of Mississippi's opening brief.

15 Now, we may have put it in a slightly more  
16 euphemistic language but the fact of the matter is  
17 Mississippi has done one of the quickest 180 turns in  
18 American jurisprudence in the last three weeks. The points  
19 they make were originally quite sound and the only submission  
20 that we've received from them has been basically one  
21 distinguishing cases as opposed to answering persuasively all  
22 the problems that Mississippi raised with the prior  
23 structure, and telling the Court, telling the world for that  
24 matter and telling the institutional investor community how  
25 the addition of Mississippi without the vetting process of a

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1 lead plaintiff proceeding would assist.

2           So, therefore, we submit that the safest most  
3 prudent course here consistent with certainly the language  
4 and the direction of the Merck case in the Third Circuit is  
5 to open it up again. We can talk about the mechanics of that  
6 which I can touch on. We've said in our letter brief that we  
7 thought 30 days. I think on reflection it might be best off  
8 making it longer than that for the simple practical reason  
9 that many of these public pension funds that are interested  
10 in this kind of litigation, they are either elected directly  
11 or they are appointed by the governor or an attorney general  
12 is involved, and we've talked with any number of these  
13 institutions and they've said, you know, we've only been in  
14 office two and a half, three weeks, what do you want us to  
15 do.

16           So, that not only accounts for why Boston is the  
17 only one who is here objecting, even though there are others  
18 who we believe are concerned, but that would argue for  
19 opening it up and giving a reasonable time for new lead  
20 plaintiffs.

21           I think notice could be given. I think that's the  
22 belts-and-suspenders approach. I think an alternative which  
23 is equally effective would be to issue another order like  
24 your Honor did and that that will make its way throughout the  
25 institutional investor community, if not deeper than that.

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1           So, if there are no further questions, we submit  
2 that Mississippi was right and they should have stuck by



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3 their guns. Thank you.

4 THE COURT: Thank you, Mr. Dubbs. All right. Who  
5 wishes to go from the other table?

6 MR. CECCHI: Very briefly, your Honor.

7 THE COURT: All right, Mr. Cecchi.

8 MR. CECCHI: Thank you, Judge. We filed a letter  
9 yesterday which touched, I believe, all the points that Mr.  
10 Dubbs made so I will also be brief as he was. I just wish to  
11 correct a number of statements.

12 There are not four new lead plaintiffs, as your  
13 Honor is well aware. The three existing lead plaintiffs  
14 which your Honor confirmed their appointment are continuing  
15 and they believe that the proposed stipulation not only  
16 resolves Mississippi's motion but is a common sense  
17 real-world solution to the issues which your Honor touched on  
18 when we were back here in November and they believe that the  
19 structure which we propose is in the best interests of the  
20 class.

21 The critical point Mr. Dubbs raised about new  
22 notice, etc., Judge, there is not a single case which  
23 requires your Honor to deal with what Mr. Dubbs' suggests.  
24 To the contrary, as we've explained in our letter, all the  
25 cases he relies upon is when there's one lead plaintiff and

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1 there's not other lead plaintiffs who have demonstrated their  
2 ability to manage the case and to go forward as there are in  
3 this case and is demonstrated, we submit, the existing lead  
4 plaintiffs submit as is demonstrated in their declaration.

5 As to the other institutional community, Judge, we  
6 posted or rather we filed our proposed stipulation not only